

**STATE OF MICHIGAN**  
**COURT OF APPEALS**

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LINSEY PORTER,

Plaintiff-Appellant,

v

COLONIAL LIFE & ACCIDENT INSURANCE  
COMPANY,

Defendant-Appellee.

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UNPUBLISHED

March 3, 1998

No. 189352

Wayne Circuit Court

LC No. 94-411628-CK

Before: Holbrook, Jr., P.J., and White and R.J. Danhof\*, JJ.

PER CURIAM.

In this employment matter, plaintiff appeals as of right from the trial court's order granting summary disposition of plaintiff's claims in favor of defendant pursuant to MCR 2.116(C)(10). We affirm in part, reverse in part, and remand for further proceedings.

Plaintiff first argues that a genuine issue of material fact exists whether defendant breached the parties' written employment contracts by falsely tendering plaintiff's resignation. Plaintiff's 1984 independent contractor agreement with defendant as an executive sales representative (ESR) provided that the agreement could be "terminated by either Party upon written notice to the other," and plaintiff's 1987 sales director (SD) agreement provided that termination of plaintiff's "writing level agreement"—which in plaintiff's case was his ESR agreement—shall constitute just cause for immediate termination of plaintiff's SD agreement. After plaintiff ran for and won election to political office, his productivity under his contracts with defendant fell below acceptable levels for successive quarters. On January 23, 1992, defendant sent plaintiff a certified letter accepting plaintiff's resignation effective December 30, 1991. Plaintiff asserts that he never submitted his resignation. Even assuming this to be true, we conclude that defendant's letter constituted notice to plaintiff that his contracts with defendant had been effectively terminated. However, to the extent that a factual issue remains regarding the effective date of plaintiff's termination and, as a consequence, the amount of commissions or other compensation due him, we remand this matter to the trial court for further proceedings.

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\* Former Court of Appeals judge, sitting on the Court of Appeals by assignment.

Plaintiff next argues that defendant breached the parties' oral modification of their written agreements which awarded plaintiff a split fee percentage of commissions generated by a particular account. We hold that the oral agreement was enforceable against defendant and we remand for further proceedings to determine whether any commissions remain due under the agreement. In 1988, plaintiff along with others secured a lucrative account with the Detroit Board of Education (DBE). According to plaintiff, in recognition of his efforts in securing this account, plaintiff's supervisor, Ray Scott, orally agreed to grant plaintiff, among other things, a twenty-five percent split fee commission on all business written from the DBE account. This agreement constituted a modification of the parties' ESR and SD agreements which set forth the commissions to be paid. On August 2, 1988, Scott sent a letter to plaintiff confirming the arrangement and indicating that the split fee was dependent on plaintiff servicing the DBE account to Scott's satisfaction. Although plaintiff asserts that Scott's letter did not accurately reflect certain terms of their oral agreement, there is no dispute that plaintiff was paid in accordance with this agreement for a period of time, until his political aspirations led to neglect of the account. At that point, Scott unilaterally reduced plaintiff's split fee percentage from the agreed upon twenty-five percent to ten percent.

Plaintiff argues that the parties' oral modification of their written agreements was valid and enforceable. Defendant counters that there was no meeting of the minds and therefore no enforceable agreement existed. To the extent that the parties do not dispute that there was an agreement that plaintiff would receive a twenty-five percent split fee of all commissions paid on the DBE account, and that plaintiff in fact received commissions on this agreement for a period of time, we conclude that a valid and enforceable agreement of some nature existed.

Moreover, the parties' modification of their written contracts was not invalid for lack of consideration. MCL 566.1; MSA 26.978(1)<sup>1</sup> provides:

An agreement hereafter made to change or modify, or to discharge in whole or in part, any contract, obligation, or lease, or any mortgage or other security interest in personal or real property, shall not be invalid because of the absence of consideration: Provided, That the agreement changing, modifying, or discharging such contract, obligation, lease, mortgage or security interest shall not be valid or binding unless it shall be in writing and signed by the party against whom it is sought to enforce the change, modification, or discharge.

Thus, a subsequent oral modification of a written contract is valid where it is supported by independent consideration.<sup>2</sup> See *Evans v F J Boutell Driveaway Co, Inc*, 48 Mich App 411, 418-419; 210 NW2d 489 (1973). Here, independent consideration supported the modification of the parties' written agreements because plaintiff was required to assume additional duties to earn the increased split fee, including servicing the DBE account himself, as well as recruiting and training new sales representatives to sell insurance under the account. Accord *In re Wood's Estate*, 299 Mich 635, 650-651; 1 NW2d 19 (1941)(the defendants' employee benefit plan as a contract was supported by ample consideration by attracting more competent workers to the defendants' employ, inducing better and more continuous service, and reducing labor turnover). *Psutka v Michigan Alkali Co*, 274 Mich 318; 264 NW 385 (1936). Thus, the trial court clearly erred in finding that the split fee agreement was not a contract, but

merely a gratuitous gesture by Scott to reward plaintiff for his efforts in securing the account. On remand, the trial court must determine the remaining essential terms of the contract and whether (or when) plaintiff or defendant breached those terms.<sup>3</sup>

Although Scott had the authority to unilaterally reduce the percentage when plaintiff failed to adequately service the account, any reduction would apply only after reasonable notice was given to plaintiff. See *In re Certified Question*, 432 Mich 438, 457; 443 NW2d 112 (1989); *Foehr v Republic Automotive Parts, Inc.*, 212 Mich App 663, 669; 538 NW2d 420 (1995). Genuine issues of fact remain regarding plaintiff's compliance with the agreement, the effective date of the reduction in commissions, and the amount, if any, of commissions due plaintiff under the parties' oral agreement. Accordingly, we remand this matter to the trial court for further proceedings regarding these issues. In its discretion, the trial court may, acting in equity, order an accounting to determine any amounts due plaintiff.

Given our resolution of plaintiff's claims above, we need not address his remaining claims raised on appeal.

Affirmed in part, reversed in part, and remanded for further proceedings consistent with this opinion.

/s/ Donald E. Holbrook, Jr.

/s/ Robert J. Danhof

<sup>1</sup> In *In re Certified Question*, 432 Mich 438, 448 n 11; 443 NW2d 112 (1989), the Michigan Supreme Court expressly declined to decide whether MCL 566.1; MSA 26.978(1) applied to employment contracts. The Court noted, however, that a federal district court had found the statute to be applicable to employment contracts. See *Small v Chemlawn Corp.*, 584 F Supp 690, 692-693 (WD Mich, 1984), *aff'd* 765 F2d 146 (CA 6, 1985). We conclude that the statute's "any contract" language encompasses employment contracts.

<sup>2</sup> The parties' modification was *subsequent* to their execution of the written agreements. Thus, the parol evidence rule—which only applies to *prior or contemporaneous* agreements—does not apply to these facts.

<sup>3</sup> Relying on the Restatement, Second, Contracts, a leading contract law treatise explains:

Once it is decided that one is dealing with an "omitted [term] case," the court should supply a term "which comports with community standards of fairness and policy rather than analyze a hypothetical model of the bargaining process." Under this rule courts have supplied terms such as "good faith," "best" or "reasonable efforts" and "reasonable notice." Although additional promises or agreements between the parties as to the omitted term may be barred by the parol evidence rule, the term may be

shown, “if relevant” on the question of what is reasonable in the circumstances.  
[Calamari & Perillo, Contracts (3d ed), § 3-18, pp 182-183.]